No. 83-720

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HUMPHREYS (CAYMAN), LTD. and
HOLIDAY INNS, INC.,

Petitioners,

v.

VICTORIA A. LEHMAN,
as Executrix of the Estate of
Robert Wayne Lehman, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this court should review the Court of Appeals decision holding that a district court abused its discretion in dismissing on *forum non conveniens* grounds a complaint filed by a U.S. citizen and resident in her home forum when:

(1) The Court of Appeals holding is consistent with U.S. Supreme Court decisions and is not in conflict with decisions of other federal courts of appeal;

(2) The balance of conveniences did not weigh heavily in favor of dismissal;

(3) The district court gave undue weight to petitioners' desire to implead a third party;

(4) The district court failed to consider realistically respondent's ability to litigate in a foreign court;

(5) The district court did not give proper weight to respondent's residence and choice of her home forum; and

(6) The district court failed to weigh the interests of the state of Iowa and the United States in the dispute.

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STATUTES AND RULES

28 U.S.C. §1332(a) (1):

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

28 U.S.C. §1404(a):

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Federal Rule of Civil Procedure 28(b):

Rule 28. Persons Before Whom Depositions May Be Taken

(b) In Foreign Countries. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority

in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

Federal Rule of Civil Procedure 29:

Rule 29. Stipulations Regarding Discovery Procedure.

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify the procedures provided by these rules for other methods of discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may be made only with the approval of the court.

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IN THE
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THE UNITED STATES
October Term, 1983

HUMPHREYS (CAYMAN), LTD. and
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Petitioners,
v.
VICTORIA A. LEHMAN,
as Executrix of the Estate of
Robert Wayne Lehman, Deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Eighth Circuit Court of Appeals held that the district court abused its discretion in dismissing respondent's wrongful death action on the ground of *forum non conveniens*. The district court had ruled that dismissal was proper because it would be more convenient for the suit to be brought in the Cayman Islands, British West Indies.

Plaintiff, Victoria A. Lehman, as executor of the estate of her husband, Robert Wayne Lehman (Lehman), filed the action in her home forum, the Northern District of Iowa. She is a citizen and resident of the state of Iowa, as was Lehman, whose presumed death occurred in the Cayman Islands while he was a guest at the Grand Caymanian Holiday Inn. Petitioner

Humphreys (Cayman), Ltd. (Cayman) is a corporation organized under the laws of the Cayman Islands but maintains its corporate offices in Memphis, Tennessee. Its principal place of business is at Grand Cayman Island where it owns and operates the Grand Caymanian Holiday Inn. Petitioner, Holiday Inns, Inc., the franchisor of Cayman, is a Tennessee corporation with its principal place of business in Memphis, Tennessee.

Jurisdiction of the district court was invoked under 28 U.S.C. §1332(a).

STATEMENT OF THE FACTS

On October 20, 1980, a son of Robert and Victoria Lehman made and paid for reservations for a double room at the Grand Caymanian Holiday Inn through an Iowa travel agency. An additional amount was paid on November 13, 1980, at a Holiday Inn near Chicago, to reserve double occupancy of the room by Lehman and his son for the period November 14 to November 22, 1980.

While a guest at the Grand Caymanian Holiday Inn, Lehman rented a 16-foot "Hobie Cat" sailboat from a shop located on the hotel premises. He and two other persons, none of whom were experienced sailors, sailed the boat in the Caribbean Sea. After several hours it was discovered the boat had disappeared and an air search was launched. The wreckage of the capsized "Hobie Cat" and the remains of a mutilated body were found three days later by the United States Coast Guard. Lehman and his two companions are presumed dead from drowning or shark attack.

Victoria Lehman's suit alleges that Cayman and Holiday Inns, Inc. expressly and impliedly warranted through advertising and travel brochures that the Grand Caymanian Holiday Inn and its

facilities were safe for their intended uses. She also claimed petitioners were negligent in failing to exercise the due care required of an innkeeper for the protection of its guests by permitting Lehman to sail the "Hobie Cat" at a time when the sea was rough and hazardous, in failing to furnish and require life jackets, and in failing to exercise supervision or maintain surveillance over Lehman while he was sailing.

A. District Court Proceedings

Cayman moved to dismiss the complaint, arguing *inter alia* that the district court had no personal jurisdiction over Cayman and, if personal jurisdiction did exist, the action should be dismissed pursuant to the doctrine of *forum non conveniens.* Holiday Inns, Inc. joined in the *forum non conveniens* motion.

The district court found that petitioners were properly served and that they had subjected themselves to the jurisdiction of the court in Iowa through advertising and distribution of travel brochures. The district court also found it was unlikely Lehman and his son would have chosen the Grand Caymanian Holiday Inn if Cayman and Holiday Inns, Inc. had not engaged in a systematic effort to generate business in Iowa. (Appendix 25a). Nevertheless, the court was "convinced that the interests of convenience" required dismissal. (Appendix 27a).

The court concluded that both "private interest factors" and "public interest factors" called for dismissal on the basis of *forum non conveniens.* Of the various private interest factors considered, it found "perhaps most important" the fact that unless trial were held in the Cayman Islands, petitioners would not be able to implead the sailboat rental shop. (Appendix 29a). The district court also found dispositive the fact that petitioners

did not have compulsory process for attendance of witnesses who live in the Cayman Islands even though many of the witnesses were their employees or under their control. (Appendix 7a). It further held that Cayman Islands had more "local interest" in the suit than the United States or Iowa and that substantive law of the Cayman Islands probably would control the case. In dismissing the action "in the interests of convenience," the district court concluded "this question, while close, must be resolved in favor of the defendants." (Appendix 27a; 29a).

Respondent moved to reconsider, pointing out that petitioners' advertising constituted express warranties which reasonably would lead an Iowa resident to anticipate that petitioners would be held to the standards of care required of innkeepers in the United States. She also emphasized that she would be prejudiced if required to proceed in the Cayman Islands where there is no unqualified right to a jury trial; that special weight should be given to her choice of the forum in which she was a citizen and resident, and that any wrongful death award in the Cayman Islands probably would be no more than a nominal amount. She also advised the court that Cayman Island attorneys do not undertake cases on a contingent fee arrangement, and that she would be required to post a bond at the time she filed suit in the Cayman Islands. (Appendix 13a).

Additional points urged by respondent were that responses to requests for admissions served with the summons could eliminate a number of fact issues, including weather conditions, that Lehman was not supplied a life jacket, that petitioners did not supervise or maintain surveillance over him while he was sailing, and that his death occurred from drowning or shark attack. Respondent also argued that she should not be penalized and

required to bring her action in a foreign country merely because petitioners stated they wished to seek indemnity against the Cayman Island corporation which operated the boat shop, particularly when petitioners' own advertising promoted "Hobie Cat" sailboats as part of the "fine rental fleet" available to guests of the Grand Caymanian Holiday Inn.

In its order denying the motion to reconsider, the district court stated it was not convinced that respondent could not afford the expense of litigating in the Cayman Islands and held that her United States' citizenship and residence did not deserve any "special weight." (Appendix 19a). Oral argument, although requested, was not granted on either the motion to dismiss or motion to reconsider.

B. Court of Appeals Decision

The Eighth Circuit Court of Appeals reversed the district court and remanded with instructions to reinstate the case. The Court of Appeals held that a dismissal on the ground of *forum non conveniens* should occur only rarely and in extraordinary circumstances and then only when the balance of conveniences weighed strongly in favor of dismissal. (Appendix 16a). Because the district court failed to properly weigh the parties' convenience, made no finding of exceptional circumstances justifying dismissal, and did not find that petitioners' interests "strongly" favored dismissal, the Eighth Circuit held that the district court abused its discretion. The Court of Appeals also concluded that the district court did not weigh properly the location of the parties' witnesses relating to both liability and damages and that it gave undue weight to petitioners' desire to implead a third-party. (Appendix 16a). The Court of Appeals further found that the district court failed to consider that Iowa

law may well control respondent's claim for breach of warranties and that both Iowa and the United States have a significant interest in the litigation. (Appendix 16a). Moreover, the Eighth Circuit decided the district court did not consider realistically respondent's ability to litigate her claims properly in a foreign court and did not give proper weight to her residence and the significant local contacts that arose as a result of that residence. (Appendix 16a).

REASONS FOR DENYING THE WRIT

THE EIGHTH CIRCUIT IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR OTHER FEDERAL COURTS OF APPEAL.

Simply because the Court of Appeals reversed the trial court's dismissal for *forum non conveniens* does not mean that the decision is in conflict with holdings of the United States Supreme Court or other circuit courts of appeal in which dismissals were upheld. Factual situations differ in every case and in *forum non conveniens* inquiries, "each case turns on its facts." *Piper Aircraft Co. v. Reyno,* 102 S. Ct. 252, 262 (1981).

The Eighth Circuit, contrary to petitioners' contentions, did not wrongfully substitute the personal jurisdiction test of "traditional notions of fair play and substantial justice" for the *forum non conveniens* standards established by this court in the leading cases, *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S. Ct. 839 (1947), and *Koster v. (American) Lumbermens Mut. Casualty Co.,* 330 U.S. 518, 67 S. Ct. 828 (1947). The Court of Appeals analyzed each of the private and public interest factors enunciated in *Gilbert* and found that the district court failed to properly weigh the parties' relative convenience.

The basis for petitioners' argument lies in a single footnote in which the Court of Appeals merely observed:

> [I]t would seem inconsistent for a court to hold that Iowa and the United States have an interest in a dispute for purposes of determining personal jurisdication, but not for purposes of determining the convenience of the forum. Therefore, as we analyze the forum non conveniens issue in this case, we rely to *some* extent on the district court's findings regarding its personal jurisdiction over the defendants. (Emphasis added). (Appendix 11a).

Petitioners blindly overlook the Court of Appeals consideration of essential factors such as location of key witnesses; interest of the forum in the dispute; application of substantive law; respondent's ability to litigate in a foreign forum; the residence of the parties; and petitioners' ability to implead.

In its analysis the Court of Appeals specifically observed the *Koster* guidelines that a plaintiff "should not be deprived of the presumed advantages" of home forum:

> except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.

Koster, 330 U.S. at 524, 67 S. Ct. at 831.

These tests were ignored by the trial court, which failed to make any finding that the forum was chosen by respondent to vex, harass, or oppress petitioners; that the balance of conveniences

was strongly in favor of petitioners; or that respondent's choice of forum was the result of forum-shopping. Rather, the district court simply considered the drawbacks of the local forum and determined that "this question, while close, must be resolved in favor of defendants." (Appendix 27a).

Respondent, a United States citizen and resident, filed suit in the Northern District of Iowa, her home forum and the only available United States venue, against two corporations conducting and soliciting business in Iowa. As noted by the Court of Appeals, the facts of this case may be contrasted with cases in which litigation had little or no connection with the forum and the action was dismissed on the ground of *forum non conveniens.* (Appendix 9a-10a). *See, e.g., Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839 (1947); *Koster v. (American) Lumbermens Mut. Casualty Co.,* 330 U.S. 518, 67 S.Ct. 828 (1947). *See also Piper Aircraft Co. v. Reyno,* 102 S.Ct. 252 (1981) (plaintiff was a secretary to the attorney who filed suit and was not related to and did not know any of the decedents or their survivors, all of whom were foreigners); *Pain v. United Technologies Corp.,* 637 F.2d 775 (D.C. Cir. 1980) *cert. denied,* 454 U.S. 1128 (1981) (four of five plaintiffs were foreign nationals).

The Eighth Circuit decision is not inconsistent with the Second Circuit. *Alcoa S.S. Co., Inc. v. M/V Nordic Regent,* 654 F.2d 147 (2d Cir. 1981), is an admiralty case involving multi-national corporations doing business abroad. There, plaintiff was a New York corporation which owned a pier in Trinidad and the lawsuit arose when a ship collided with the pier. The Second Circuit held that Trinidad's limitation of damages law did not require reversal of the district court's decision that Trinidad was the more convenient forum. The Second Circuit pointed out that it was not unfair for the Alcoa Steamship Company to recover the lesser

amount when Alcoa was fully familiar with the law of the place where it maintained a permanent business and could have insured its additional risk.

In the instant case, Robert Lehman was not doing business abroad on a regular basis but was pursuing a personal vacation of a few days' duration. He dealt with an American corporation in arranging for reservations and relied upon petitioners' representations received by him in Iowa. Petitioners actively solicited business in the United States, were incorporated or at least maintained corporate offices here, and fairly could be expected to anticipate and take into account the cost of defending a lawsuit brought in the United States.

A recent Second Circuit decision, *Manu International, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 63 (2d Cir. 1981), made it clear that its *Alcoa* decision was confined to the facts of that particular case. The second circuit in *Manu*, like the Eighth Circuit here, held that a district court exceeded "the limits of its discretion" in dismissing the case on *forum non conveniens* grounds.

THE DISTRICT COURT EXCEEDED THE LIMITS OF ITS DISCRETION.

Although a trial court has discretion to dismiss for *forum non conveniens*, its discretion should be exercised only rarely and in extraordinary cases. Discretion was abused here where: (1) The balance of the private and public interest factors was not strongly in favor of petitioners. *See, e.g., Manu International, S.A. v. Avon Products, Inc.*, 641 F.2d 62 (2d Cir. 1981); *Hoffman v. Goberman*, 420 F.2d 423 (3d Cir. 1970); (2) There was no weighing of the relative advantages of each forum but only a

consideration of the drawbacks of one. *See Founding Church of Scientology v. Verlag,* 536 F.2d 429 (D.C. Cir. 1976); (3) It was not manifestly unjust, vexatious, or oppressive to subject petitioners to trial in respondent's forum. *See, e.g., Piper Aircraft Co. v. Reyno,* 102 S.Ct. 252 (1981); *Aigner v. Bell Helicopter, Inc.,* 86 F.R.D. 532 (N.D. Ill. 1980); (4) Respondent sued in her home forum and made a real showing of convenience. *See Koster v. (American) Lumbermens Mut. Casualty Co.,* 330 U.S. 518, 524; 67 S.Ct. 828, 832 (1947); and (5) The local forum has a significant interest in the litigation. *See Aigner v. Bell Helicopter, Inc.,* 86 F.R.D. 352 (N.D. Ill. 1980).

In addition, the Court of Appeals reversed because several significant factors favoring retention of jurisdiction were overlooked or ignored by the district court. The Court of Appeals correctly perceived that the district court did not fairly and realistically assess the relative abilities of the parties to try the lawsuit in the Cayman Islands as opposed to the Northern District of Iowa. Petitioners are better able to afford litigation in respondent's forum in the United States, and any added expenses or inconveniences should be borne by the corporations seeking and doing business here on a regular basis. Further, both petitioner corporations have their headquarters in Memphis, Tennessee, and many of petitioners' witnesses are employees or under petitioners' control. Although these witnesses are not subject to compulsory process, the trial court failed to recognize that Federal Rules of Civil Procedure 28(b) and 29 provide a method for taking foreign witness testimony and that the use of admissions could eliminate the need for much testimony.[1]

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[1] Along with a summons, respondent served requests for admission on each petitioner. Petitioners have been excused from answering the requests pending a ruling on their motion to dismiss.

The district court's improper conclusion that petitioners' inability to implead and seek indemnity from the boat shop in the United States mandated dismissal was corrected by the Eighth Circuit. The trial court's finding violated the principle that duties imposed upon an innkeeper for the protection of its guests are nondelegable and liability cannot be avoided on the ground that their performance was entrusted to an independent contractor. *Blackhawk Hotels Company v. Bonfoey*, 227 F.2d 232 (8th Cir. 1955). Further, as noted by the Court of Appeals, the warranties alleged by respondent were made by petitioners, not the boat shop owner.

In holding that Cayman Islands was the forum with the more significant local interest and that it was more likely Cayman law would apply, the district court was not consistent with its findings that Lehman and his son would never have chosen the Grand Caymanian Holiday Inn if Cayman and Holiday Inns, Inc. had not engaged in a systematic effort to entice Iowans to the Cayman Islands to vacation at their hotel. Iowa law logically should apply with regard to respondent's claims that petitioners breached their warranties that the hotel and its facilities were safe for their intended uses. These warranties, through advertising and travel brochures, were made in Iowa.

Additional advantages for retention of jurisdiction in the federal district court in Iowa which were not weighed by the trial court or were found not to be significant, include: (1) Respondent chose the only forum available to her in the United States and was not forum shopping; (2) Respondent is a legitimate United States citizen and resident of the forum and not merely a nominal plaintiff. *Cf. Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252 (1981); (3) Both the United States and Iowa have an interest in

providing a forum for its injured citizens. *Aigner v. Bell Helicopters,* 86 F.R.D. 532 (N.D. Ill., 1980); *Fiacco v. United Technologies Corp.,* 524 F.Supp. 858 (S.D. N.Y. 1981); (4) No translations would be necessary in the United States court because everyone appears to speak English. *Mizokami Bros. of Arizona, Inc. v. Mobay Chemical Corp.* 660 F.2d 712 (8th Cir. 1981).

RESPONDENT'S CHOICE OF HER HOME FORUM DESERVES SPECIAL WEIGHT WHERE SHE IS A UNITED STATES CITIZEN AND THE ONLY ALTERNATIVE FORUM IS A FOREIGN JURISDICTION.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839 (1947), and *Koster v. (American) Lumbermens Mut. Casualty Co.,* 330 U.S. 518, 67 S.Ct. 828 (1947), did not involve relegation of an American resident plaintiff to the courts of a foreign country. Although the standards set by the Supreme Court in both cases still pertain, an additional factor must also be considered in a *forum non conveniens* inquiry: United States citizenship and residency. This issue was not addressed in *Gilbert* and *Koster* because all the parties in those disputes were U.S. citizens and the result of the rulings was merely to transfer the lawsuits to other federal courts in the United States.

Gilbert and *Koster* were codified into law by the enactment of 28 U.S.C. §1404(a). A district court may transfer a case to another district court under §1404(a) when it is more convenient for the case to be tried in the alternative jurisdiction. Because a transfer under §1404(a) does not involve sending an American resident to the courts of a foreign country, the issue of American citizenship is not even a part of the weighing process. Therefore,

district courts have more discretion to transfer under §1404(a) than they have to dismiss on grounds of *forum non conveniens*. *Piper Aircraft Co. v. Reyno*, 102 S.Ct. 252 (1981).

In *Reyno*, this court held that the presumption in favor of plaintiff's choice of forum applied with less than maximum force when the real parties in interest were foreign. 102 S.Ct. at 268. In that case the plaintiff was the legal secretary for the lawyer who filed the lawsuit in the United States. She was appointed administrator of the estates of foreign decedents although she was not related to and did not know any of them. Reyno candidly admitted that the action was filed in the United States because its laws regarding liability and damages were more favorable than those in the alternative forum, Scotland, where the decedents were citizens and the accident happened. 102 S.C. at 257.

A much stricter standard must be applied before the complaint of a legitimate United States citizen-plaintiff can be dismissed to a foreign country, especially where the defendants also are from the United States or have strong United States connections. The present case is a classic example of a situation where the presumption in favor of plaintiff's choice of forum must be applied with maximum force. The statement of the Second Circuit Court of Appeals in *Manu International, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 67 (2d Cir. 1981), is particularly pertinent:

> **It is almost a perversion of the *forum non conveniens* doctrine to remit a plaintiff, in the name of expediency, to a forum in which, realistically, it will be unable to bring suit when the defendant would not be genuinely prejudiced by having to defend at home in the plaintiff's chosen forum.**

CONCLUSION

Petitioners have wholly failed to sustain their burden of establishing special and important reasons for granting the writ of certiorari. The Eighth Circuit Court of Appeals did not decide the case in a way which conflicted with applicable decisions of this court or another federal court of appeals. The Eighth Circuit correctly held that the district court abused its discretion in dismissing respondent's action. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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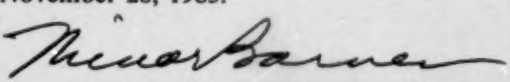
CERTIFICATE OF SERVICE

I, Minor Barnes, attorney for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served true and correct copies of the foregoing Respondent's Brief in Opposition on John S. Richbourg, Suite 2002, Clark Tower, 5100 Poplar Avenue, Memphis, Tennessee, 38118, by mail on November 28, 1983.



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